It is quite obvious that plaintiff had really wanted to transfer all his rights, title and interest in the premises to defendant and that defendant had wanted to pay plaintiff in full when they made P2. Plaintiff needed the money while defendant needed the premises. It is equally obvious that in spite of the Company's refusal to give written approval and consent both plaintiff and defendant and most probably also the Company expected that such approval and consent would be given. Unfortunately the Company have not been able to give their written approval and consent, apparently because the land on which the premises stand is still registered in the name of Pioneer Enterprises Sendirian Berhad and that no written agreement can yet be made between the Company and plaintiff in respect of the premises. It was not until August 21, 1974 when plaintiff's solicitors sent P5 to defendant that plaintiff expressed his intention to repudiate P2, but even then the purported repudiation was made under proviso (b) and not under proviso (a), and as such intention was reiterated in P7 dated September 9, 1977 it cannot be said, as plaintiff sought to allege in the proposed amendment to paragraph 4, to have been made inadvertently. Furthermore, it would be a matter of mere speculation as to what defendant's reaction would be had plaintiff repudiated P2 under proviso (a) and it is significant that it was only on September 12, 1977 when the Company replied in P8 to P7 dated September 9, 1977 that an acknowledgment in writing was obtained from the Company that they were not prepared to give their written approval of and consent to the transfer of the premises from plaintiff to defendant.

I would also decide not to allow the proposed amendment to paragraph 6(d) as I consider it unnecessary, it being only a clarification of the basis on which damages are to be assessed should plaintiff succeed in his claim.

In view of what is averred in the Statement of Claim and the evidence adduced prayer (a), which is for a declaration that P2 is no longer binding on plaintiff, must necessarily be based on the purported repudiation of P2 under proviso (b). Defendant denies that plaintiff has a right to do so and I agree with him. The issue depends entirely upon the interpretation of that proviso. The approval and consent referred to therein is that which plaintiff has undertaken to obtain under proviso (a) and under proviso (b) plaintiff can only refuse or be unwilling to transfer his rights, title and interest to defendant in the event that the Company are prepared to give their written approval and consent to the transfer. As no such approval and consent has been obtained P5 and P7 have no legal effect and defendant has rightfully returned plaintiff's cheque for $20,000. P2 being still in existence plaintiff is not entitled to prayer (a). It is true that a further condition has been added in defendant's letters which he has repeated in his evidence that he is not paying the balance of $8,000 unless and until the transfer is registered in his name, but in my view that cannot be considered as fatal to defendant's case since the written approval and consent of the Company to the transfer itself has not been obtained.

As to the alternative prayer (b) which is for rescission of P2 I also agree with defendant that plaintiff is not entitled to it. As stated in 9 *Halsbury's* Laws of England 4th Edition at page 369 under paragraph 535:

"Rescission is the name given to a process whereby an existing contract is brought to an end and the effects of its existence are cancelled or terminated.... Though in some circumstances it is possible to bring an action for rescission, rescission always involves an act of a party (or of both parties) which if rightly exercised, may be relied upon as a defence in any subsequent action."

and at page 371 under paragraph 540:

"In considering whether there has been defective performance such that the innocent party may treat the contract as discharged, it must be ascertained whether, on the proper construction of the contract, the performance of the promise of one party is a condition precedent to the liability of the other to perform his part or is independent of it...."

The evidence shows that defendant has performed his part of P2 and has not committed any breach of any of its terms which would justify plaintiff to claim for its rescission. As for the demand for $8,000 defendant was right not to pay until a written approval and consent which plaintiff has undertaken to obtain in writing from the Company has been obtained. It is true that having been put into possession of the premises defendant has taken advantage of P2, but as he is also ready and willing to fulfill his obligation to pay the $8,000 to plaintiff provided that the condition precedent to it is fulfilled by plaintiff it cannot be said that he is approbating and reprobating it.

Subsequent prayers are incidental to and dependent on prayers (a) and (b) and as he has not succeeded in those prayers I would dismiss plaintiff's claim with costs.

Order accordingly.

Solicitors: *Goh Soot Hwang & Co.; Yau Jiok Hua.*

THE "FUJI HOSHI MARU"; UNITED ASIAN BANK BHD. v. M/V. FUJI HOSHI MARU, OWNERS & ORS. INTERESTED

[O.C.J. (Vohrah J.) March 18, 1980]
[Kuala Lumpur — Admiralty Suit No. 2085 of 1978]

Practice and Procedure — Statement of claim — Application to strike out — Whether action vexatious and frivolous — Rules of the Supreme Court, 1957, O. 25 r. 4.

Shipping Law — Bill of lading — Document of Title — Claim by indorsees of bill of lading for non-delivery of goods.

Arbitration — Stay of proceedings — Charterparty with arbitration clause — Claim for non-delivery by indorsees of bill of lading — Whether plaintiffs had locus standi — Bill of lading did not incorporate arbitration clause of charterparty.

Jurisdiction — Stay of proceedings — Whether court had jurisdiction to try suit — Courts of Judicature Act, 1964, ss. 23 & 24 — U.K. Administration of Justice Act 1956.

The plaintiffs in this case, indorsees of a bill of lading for oil shipped on board the defendants' vessel, Fuji Hoshi Maru, for carriage from Butterworth to Penang issued a writ against the defendants for non-delivery of their oil palm cargo. The plaintiffs claimed that the oil palm worth M$980,832.14 was wrongfully delivered to a person not in possession of the bill of lading. At the instance of the plaintiff, the said vessel was arrested at Port Klang.

The defendants sought for a stay of the proceedings. They claimed that the charterparty provided for reference of a dispute to arbitration in London, and questioned the *locus standi* of the plaintiffs to bring the action. The defendants

also sought for the setting aside of the warrant of arrest executed in respect of their vessel.

Held: (1) the provision regarding arbitration could only apply to a dispute arising out of the charterparty and could not be extended to a dispute arising out of the bill of lading; the general provision in the bill of lading stipulating that the shipment was carried under and pursuant to the terms of the charterparty did not incorporate the arbitration clause of the charterparty;

(2) the Courts of Judicature Act 1964, section 24(b) confers jurisdiction on the High Court to entertain the present suit;

(3) so long as the contract for the carriage of goods by sea is not discharged, the bill of lading "remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred" and a ship-owner who delivers without production of the bill of lading does so at his peril;

(4) the bill of lading was delivered to the plaintiffs in proper set thus giving them "property sufficient to enable them to maintain the action";

(5) the application must be dismissed as no case had been made out for the suit to be struck out.

Cases referred to:-

(1) *Hamilton & Co.* v. *Mackie & Sons* (1888-9) 5 T.L.R. 677.

(2) *The Annefield* [1971] P. 168.

(3) *The Stettin* (1889) 14 P.D. 142.

(4) *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576; [1959] M.L.J. 200.

(5) *Barclays Bank Ltd.* v. *Commissioners of Customs & Excise* [1963] 1 Lloyd's Rep. 81.

ADMIRALTY SUIT.

C. Abraham for the applicants/defendants.

Y.M. Chin for the respondents/plaintiffs.

Cur. Adv. Vult.

Vohrah J.: The plaintiffs in this case as owners of oil palm or indorsees of a bill of lading for the oil shipped on board the defendants' vessel, Fuji Hoshi Maru, for carriage from Butterworth to Penang issued a writ against the defendants claiming damages for conversion and/or breach of contract and/or breach of duty and/or negligence of the defendants, their servants or agents for non-delivery of the oil.

It was averred by counsel for the plaintiffs that the oil palm was worth M$980,832.14 and belonged to the plaintiffs and was wrongfully delivered to a person not in possession of the bill of lading. When the vessel was in the territorial waters of Malaysia having been in Port Kelang for the discharge and receipt of some goods it was arrested by the bailiff of the High Court in pursuance of a warrant of arrest issued at the instance of the plaintiff bank, a bank incorporated in the States of Malaya. It was also averred that the defendants were at the time when the cause of action arose owners of the vessel and were the persons liable in an action *in personam* under the provisions of the United Kingdom Administration of Justice Act, 1956 which vested the court with jurisdiction by virtue of section 24(b) of the Courts of Judicature Act, 1964 which reads: —

"Without prejudice to the generality of section 23 [dealing with the general civil jurisdiction of the High Court] the civil jurisdiction of the High Court shall include —

(a) ....

(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Administration of Justice Act, 1956; ...

...."

It was further averred that in consequence of a search made at the port of registry of the vessel in Tokyo the defendants were the beneficial owners of all the shares in the vessel. As a result of a bank guarantee furnished by the defendants the vessel was later released.

By way of a notice of motion (*vide* enclosure 14) the defendants prayed that —

(1) all proceedings in the suit be stayed;

(2) the suit be dismissed pursuant to the provisions of Order 25 rule 4 of the Rules of the Supreme Court, 1957;

(3) the warrant of arrest executed in respect of the vessel be set aside;

(4) the bank guarantee furnished by the defendants for the vessel's release be returned to the defendants; and

(5) costs of the notice of motion be provided for.

With regard to the first prayer for stay of all proceedings in the action three grounds were put forward namely: —

(i) that Special Provision 2 of Clause H of the charterparty entered into between the shippers, Malayan Produce Co. Sdn. Bhd., and the defendants provided for reference of a dispute to arbitration in London;

(ii) that the court by virtue of section 23 of the Courts of Judicature Act, 1964 had no jurisdiction to try the action; and

(iii) that the plaintiffs had no title in law to bring the action.

With regard to the first ground, the bill of lading (*vide* Enclosure 2, CYM-1) provided that the shipment was carried "under and pursuant to" the terms of the charterparty (*vide* "KI.1") entered into between Tokyo Marine Co. Ltd. and Malayan Produce Co. Sdn. Bhd. Special Provision 2 of Clause H of the charterparty provided as follows: —

"Arbitration and General Average, if any, to be settled in London. York/Antwerp Rules 1974 to be applied."

It was contended by counsel for the defendants that the plaintiffs' claim of conversion and/or breach of contract or breach of duty or negligence on the part of the defendants for non-delivery of the oil palm and the defendants' claim that the oil had in fact been delivered to the consignees against documents used in normal shipping practice constituted a dispute within the scope of the arbitration clause and further proceedings should be stayed. There can be no question that a dispute has in fact arisen but in my view the special provision mentioned can only apply to a dispute arising out of the charterparty itself and cannot be extended to a dispute arising out of the bill of lading (*vide Hamilton & Co.* v. *Mackie & Sons*[1] and *The Annefield*[2]). I hold therefore as a matter of interpretation that the general provision in the bill of lading stipulating that the shipment was carried under and pursuant to the terms of the charterparty

did not incorporate the arbitration clause of the charterparty.

The second ground for staying proceedings which was raised by counsel for the defendants was that the court had no jurisdiction to try the suit by virtue of the express provisions of section 23 of the Courts of Judicature Act, 1964. I do not think there was merit in this ground as I am of the view that the provisions of section 24(b) of the Act are sufficiently wide to enable the court to entertain the suit. There was no dispute as to the fact that the High Court of Justice in England had jurisdiction over the matter by virtue of the United Kingdom Administration of Justice Act, 1956. Since there is a specific provision contained in section 24 conferring this jurisdiction on the High Court in Malaya there can in my view be no doubt that the court has jurisdiction to entertain this matter.

With regard to the third ground urged to stay proceedings, the bill of lading stipulated that the cargo be delivered at the port of Bombay "unto TO ORDER OF UNITED ASIAN BANK BERHAD." It was clear that the plaintiffs or their assigns were the consignees (*vide* PA-1 exhibited to Enclosure 21). It was also clear on the authorities, *The Stettin,*[3] *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*[4] and *Barclays Bank Ltd.* v. *Commissioners of Customs & Excise,*[5] that, so long as the contract for the carriage of goods by sea (which is evidenced by the bill of lading) is not discharged, the bill of lading "remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred" and a shipowner who delivers without production of the bill of lading does so at his peril. That the plaintiffs were in possession of the bill of lading was not challenged by the defendants. In fact it was clear from the letters of hypothecation and security letters, PA2 to PA6 exhibited to the affidavit (Enclosure 21) of the Assistant General Manager of the plaintiff bank, that the plaintiffs were pledgees for value of the bill of lading. The defendants alleged that the bill of lading had been discounted as security for advances made to the shippers/pledgors, Patel Holdings Sdn. Bhd., but this allegation was denied by the plaintiffs who averred that the bill of lading was delivered to the plaintiffs in proper set thus giving them "property sufficient to enable them to maintain the action" and further that as named consignees in the bill of lading the plaintiffs had domain over the goods. I accepted the contention that the plaintiffs had in consequence the *locus standi* to bring the action.

In the result, and, no case having been made out for the suit to be struck out under Order 25 rule 4, I dismissed the application in respect of all its first four prayers and ordered the costs, in the circumstances of this case, to be costs in the cause.

The application in Admiralty Suit No. 2262 of 1978 was similar to that before me and as the same arguments applied I dismissed it similarly with regard to the substantive prayers and also ordered that the costs of the application be costs in the cause.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Allen & Gledhill.*

ABDUL MAJEED v. DATO' SULAIMAN

[O.C.J. (Ajaib Singh J.) February 3 & September 4, 1980]
[Muar — Civil Suit No. 88 of 1979]

Practice and Procedure — Statement of claim — Vexatious and frivolous — Statement struck out — Rules of the Supreme Court 1957, O. 25 r. 4.

The plaintiff in this case sought to enforce an agreement made between the plaintiff and the defendant in 1968 and in regard to a sale of the house known as No. 1 Jalan Sisi, Muar.

The defendant applied to have the statement of claim struck out on the ground that it disclosed no reasonable cause of action, it was frivolous and vexatious and an abuse of the process of the court.

Held: the plaintiff did nothing to enforce his claim that the defendant had made a promise to sell the premises to him until the last minute which clearly showed that he had brought the present action in order to embarrass the plaintiff and delay his building project.

SUMMONS-IN-CHAMBERS.

E. Ramasamy for the applicant/defendant.

Elyas Majeed for the respondent/plaintiff.

Cur. Adv. Vult.

Ajaib Singh J.: This was an application by the defendant to have the statement of claim struck out under Order 25 rule 4 on the ground that it disclosed no reasonable cause of action, it was frivolous and vexatious and that it was an abuse of the process of the court.

The plaintiff's claim was for "specific performance of the agreement between the plaintiff and the defendant made sometime in the year 1968 and subsequently regarding sale/lease of a house known as No. 1 Jalan Sisi, Muar, Johore and damages". The statement of claim is not very lengthy. Instead of trying to paraphrase it I think I shall set it out here in full.

"STATEMENT OF CLAIM

The plaintiff is occupant of shophouse No. 1, Jalan Sisi, Muar which premises together with the land on which it is situated is hereinafter referred to as the 'said premises'. He had been in occupation of same for the past 18 years.

2. Sometime in the year 1964, the registered owner of the said premises, a person by the name of Kanagasapai, negotiated with the plaintiff for sale of the said premises to the plaintiff. While such negotiations were in progress the said Kanagasapai died and his successor-in-title sold the same premises to the defendant.

3. The defendant was at all material times aware of the negotiations between the plaintiff and the deceased, Kanagasapai and his successor-in-title. The said premises formed part of a larger piece of land Lot Nos. 385 and 907, Johore Grant Nos. 3044 and 3689 which the defendant intended to buy and the defendant informed the plaintiff that if the plaintiff would abandon his right to buy the said premises and forbear his interests therein, the defendant would subsequently sell to the plaintiff the said premises for a price of $18,000 and subsequently increased to $25,000 or thereabouts in consideration of such forbearance.

4. On various occasions the plaintiff approached the defendant to enter into the formal Sales Agreement in respect of the said premises but the defendant assured the plaintiff that the delay was inevitable as the opportune time for sale documentation would be when the other pieces of land contained in the larger piece are excised and alienated. In the meanwhile, the defendant assured the plaintiff that he could continue as a tenant and that in any event even if the sale did not materialise the plaintiff would be granted a lease of the said premises for 30 years.